Supreme Court, U.S.
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No. 96-1913

# In the Supreme Court of the United States

OCTOBER TERM, 1996

W.L. HODGE, PETITIONER

*v.*

JOHN DALTON, SECRETARY OF THE NAVY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner is barred from suing the Secretary of the Navy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, because petitioner is a uniformed member of the United States Marine Corps.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 107 F.3d 705. The opinion of the district court is unreported.*

### JURISDICTION

The judgment of the court of appeals was entered on February 19, 1997. The petition for a writ of certiorari was filed on May 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* The petition appendix is not paginated. We have assigned consecutive numbers to the pages therein. Additionally, the opinion of the district court was not reproduced in the appendix. That opinion can be located in the C.A. Appellant's Excerpts of Record 5-24.

## STATEMENT

Petitioner, an active duty member of the United States Marine Corps, brought suit in the United States District Court for the District of Hawaii under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* He alleged that he was injured by racial discrimination in employment. The district court ruled that the relevant provisions of Title VII, which are administered through regulations promulgated by the Equal Employment Opportunity Commission (EEOC), do not provide a remedy for uniformed members of the armed forces. See C.A. Appellant's Excerpts of Record (E.R.) 5-24. Petitioner appealed, and the court of appeals affirmed that judgment. Pet. App. 1-18.

1. At the time of the relevant events, petitioner was assigned to active duty at the Camp H.M. Smith Marine Corps Base, on the island of Oahu, Hawaii. In addition to his military assignment, he worked at the Marine Corps Base Enlisted Club at Kaneohe, Hawaii. The Club is a part of the Base's Morale, Welfare, and Recreation Department (MWR). Pet. App. 5. The MWR is governed by the military chain of command and operates under the direct supervision and control of the installation commander. *Id.* at 12-13.

Petitioner had a dispute with his supervisor at the MWR over the number of hours that petitioner was required to work. He complained to the MWR's personnel office and attempted to file an administrative action alleging that he was subjected to racial discrimination in violation of Title VII. The personnel office determined that petitioner was not eligible

to file the Title VII action because he was a uniformed member of the Marine Corps. Pet. App. 5-6.

2. Petitioner filed this suit in district court to compel respondent to process his administrative action. Pet. App. 6; E.R. 6. The court granted the Secretary of the Navy's motion to dismiss petitioner's complaint and denied petitioner's motion for summary judgment. Pet. App. 6; E.R. 6-25. The court held that Section 717 of Title VII, 42 U.S.C. 2000e-16, which addresses the application of Title VII to the federal government, does not provide a remedy for uniformed members of the military departments. E.R. 10-14.

The district court examined the EEOC's regulations governing the application of Section 717, 29 C.F.R. Pt. 1614, and it concluded that the EEOC had "acted within its delegated authority to exclude complaints by active duty service members from the coverage of [Section 717]." E.R. 15. The court rejected petitioner's contention that he was entitled to Title VII relief based on his part-time employment at the MWR. E.R. 16. The court found that the MWR is governed by the military chain of command and concluded that petitioner's action "involves a legal challenge to a senior Marine Corps officer and is subject to the rationale of the line of cases which has precluded discrimination claims by members of the military in light of the unique relationship existing therein." *Ibid.*

The district also relied on the doctrine of intra-military immunity in denying relief. See E.R. 16-20, citing *McGowan* v. *Scoggins*, 881 F.2d 615, 619-620, opinion amended and superseded on denial of reh'g, 890 F.2d 128 (9th Cir. 1989), and other cases. The court noted that uniformed members of the military have

other statutory remedies to address complaints of discrimination in the military. See E.R. 20-22, citing 10 U.S.C. 1552 and 42 U.S.C. 1985(3). In light of its holding that petitioner had no right to a Title VII remedy, the court concluded that the issue of petitioner's right to mandamus relief was moot. *Id.* at 22-23.

3. The court of appeals affirmed. Pet. App. 1-18. Like the district court, the court of appeals concluded that petitioner was "explicitly excluded from coverage by EEOC regulations." *Id.* at 9, citing 29 C.F.R. 1614.103(d). The court adhered to its previous decision in *Gonzalez* v. *Department of the Army*, 718 F.2d 926 (9th Cir. 1983), which held that Section 717 of Title VII allows suits only by "civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel." *Id.* at 928. The court of appeals noted that all the other circuits that have addressed the issue have also held that Title VII is inapplicable to uniformed members of the military. Pet. App. 10. It found no reason to depart from those rulings in this case. *Id.* at 10-18.

## ARGUMENT

The court of appeals held that Title VII does not provide a remedy to persons, such as petitioner, who are uniformed members of a military service. That decision is correct, it does not conflict with any decision of this Court or another court of appeals, and it does not warrant further review.

1. Title VII does not include the United States within the statute's general definition of an "employer." See 42 U.S.C. 2000e(b) (defining "employer" and excluding the "United States"). Congress instead provided remedies for discrimination in federal

employment through Section 717 of Title VII, 42 U.S.C. 2000e-16, which provides a proscription against discrimination, 42 U.S.C. 2000e-16(a) (1994 & Supp. I 1995), and directs the EEOC to issue rules to implement and enforce that policy in the federal workplace, 42 U.S.C. 2000e-16(b). See Pet. App. 6-8.

Section 717(a) of Title VII provides that "personnel actions affecting employees * * * in military departments as defined in section 102 of title 5 [of the United States Code] * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) (1994 & Supp. I 1995). The EEOC has implemented that provision through regulations that allow civilian employees of the military departments to invoke prescribed remedies. 29 C.F.R. 1614.103(b). The EEOC's regulations do not extend, however, to uniformed "members" of the military departments. 29 C.F.R. 1614.103(d). See Pet. App. 7-8.

The EEOC's regulations rest on a sound interpretation of Section 717, which refers to the term "military departments" as it is used elsewhere in the United States Code. Section 102 of Title 5 of the United States Code defines "military departments" as "The Department of the Army," "The Department of the Navy," and "The Department of the Air Force." By contrast, Section 101(4) of Title 10 of the United States Code defines "armed forces" to include "the Army, Navy, Air Force, Marine Corps, and Coast Guard." As the court of appeals explained:

> [T]he two differing definitions show that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, and the latter of uniformed

military personnel.

Pet. App. 9-10, quoting *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 928 (9th Cir. 1983), That distinction also accords with Section 717's legislative history. *Ibid.*

As the court of appeals recognized in *Gonzalez*, Section 717's distinction between uniformed members and civilian personnel does not leave petitioner without a remedy for discrimination. See 718 F.2d at 929 n.2. Petitioner may pursue statutory remedies, designed specifically for military members, to remedy wrongs committed within the service. See 10 U.S.C. 938, 1552. In addition, a military member may pursue administrative remedies for discrimination through the military's equal opportunity programs. See E.R. 21. Petitioner was specifically informed that this remedy was available to him. *Ibid.*

2. The court of appeals' decision in this case is consistent not only with *Gonzalez*, but with the decisions of every other court of appeals that has considered the question. Those courts have uniformly held that Title VII does not provide uniformed members of the armed forces with a remedy for discrimination. See *Roper* v. *Department of the Army*, 832 F.2d 247, 248 (2d Cir. 1987) (rejecting Army Reserve member's claim of discriminatory non-promotion based on sex and race); *Stinson* v. *Hornsby*, 821 F.2d 1537, 1541 (11th Cir. 1987) (rejecting National Guard member's claim of discriminatory discharge based on race), cert. denied, 488 U.S. 959 (1988); *Taylor* v. *Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) (rejecting National Guard Reserve recruiter's race discrimination claim); *Johnson* v. *Alexander*, 572 F.2d 1219, 1223-1224 (8th Cir.) (rejecting Army applicant's claim of discriminatory

rejection based on race), cert. denied, 439 U.S. 986 (1978); see also *Doe* v. *Garrett*, 903 F.2d 1455, 1461 (11th Cir. 1990) (rejecting Naval Reserve member's claim under the Rehabilitation Act of discriminatory release from active duty based on handicap), cert. denied, 499 U.S. 904 (1991).

3. Petitioner appears to argue that his situation is distinguishable because he is "part-timed employed by a non-appropriated funded agency of the U.S. Navy during his off-duty hours" (Pet. i). The court of appeals considered and properly rejected that claim. As the court observed, the relevant statutes provide no basis to "distinguish between military departments operated out of appropriated funds and those using nonappropriated funds." Pet. App. 11. The court also noted that even though petitioner was employed outside of his normal duty hours, his employment at the MWR, a department of the Marine Base, was "governed by the military chain of command," *id.* at 13, "was subject to 'direct military control,'" *id.* at 14, and "as such was 'incident to military service,'" *ibid.* In any event, in the absence of a conflict in the circuits, the factual distinction that petitioner posits does not give rise to an issue of general importance warranting this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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